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## **The Legal Protection of the Personality Right in the Romanian Civil Legislation**

### *Personality rights. Notion, legal nature and regulation in the Romanian Civil Code*

Usually, in the current language, the concept of *personality* supposes „the totality of the psychic features of an individual”, „what is intrinsic, specific to every person” or is used to designate a person with particular skills in a certain area. The concept is also used with other meanings: to designate a person with particular skills in a certain area; to designate the leader of a state, of a social group, who, through the activity carried out, influences decisively the performance of the events.

From a legal perspective, the notion of personality rights refers to those rights exerting over some features inherent to the human being who belong to any person since his/her birth. As stated in the literature<sup>1</sup>, the personality referred to by these rights is not reduced to the technical notion of legal personality, i.e. to be a subject of law. It aims at expressing more, such as: the human being in his/her wholeness, in his/her biological, psychological and social reality.

For the first time, the concept of personality rights was used in the German legal system where they are expressly regulated by law. As a principle, the German Civil Code contains some regulations according to which the person who prejudices the life, the body, the health and the liberty of another person, is bound to remedy the damage caused (art. 823 BGB). Staring from such provisions, the case law and the specialised literature consecrated

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<sup>1</sup> O. Ungureanu, C. Munteanu, *Drept civil. Persoanele*, Hamangiu Publishing House, Bucharest 2013, p. 44.

the right to respecting life, physical integrity and liberty of movement, and the Federal Court of Justice, starting from arts. 1 and 2 of the Federal Constitution on human dignity and development of personality, consecrated a general personality right<sup>2</sup>.

When defining the notion of personality rights, most of the doctrinaires<sup>3</sup> started from the definition of subjective rights and their separation from civil liberties.

Thus, the civil subjective law is the possibility of the active subject, within the civil legal rules, to have a certain behaviour and to claim a corresponding behaviour to the passive subject, and, if necessary, to request the use of the coercive force of the state<sup>4</sup>.

At the same time, they stated that the subjective law is a legitimate constraint of the liberty of the other, established by legal rule in favour of the subject who consequently benefits from a reserved domain in order to exert his/her prerogatives<sup>5</sup>.

Generally speaking, the liberties consist in making what you want or, as stated in the specialised literature, „not making what you do not want”<sup>6</sup>. Thus, besides rights, there are some liberties consecrated by the civil law. They are not genuine subjective rights, they are attributes or prerogatives in a way, as they do not have a precisely established object. Mostly, they are not consecrated by an express provision of the law. But as such civil liberties have more in common with the personality rights, they can not be separated, so they are joined – as shown in the literature<sup>7</sup> – in the category of personality rights. Also, they rightfully say<sup>8</sup> that, as long as such liberties enjoy a legal regulation in the domestic law or in international treaties, they are part of personality rights.

<sup>2</sup> See also: A. Drăghici, R. Duminică, *Stare civilă*, Sitech Publishing House, Craiova 2013, pp. 14–19.

<sup>3</sup> See also: P. Kayser, *Les droits de la personnalité. Aspects théoriques et pratiques*, „Revue trimestrielle de droit civil” 1971, vol. 29, pp. 448–454; G. Mihai, G. Popescu, *Introducere în teoria drepturilor personalității*, Publishing House of the Romanian Academy, Bucharest 1992, pp. 55–64.

<sup>4</sup> G. Beleiu, *Drept civil român. Introducere în dreptul civil. Subiectele dreptului civil*, Editura Universul Juridic, București 2007, p. 77; G. Boroi, *Drept civil. Partea generală. Persoanele*, Hamangiu Publishing House, Bucharest 2008, p. 76 and others.

<sup>5</sup> J. Ghestin, G. Goubeaux, *Traté de droit civil. Introduction générale*, L.G.D.J., Paris 1977, p. 141.

<sup>6</sup> G. Cornu, *Droit civil. Introductions. Les personnes. Les biens*, ed. a XII-a, L.G.D.J., Paris 2005, p. 185.

<sup>7</sup> O. Ungureanu, C. Munteanu, *Drept civil. Persoanele*, second edition, Hamangiu Publishing House, Bucharest 2013, p. 44.

<sup>8</sup> E. Chelaru, *Drept Civil. Persoanele*, C.H. Beck, Bucharest 2012, p. 19.

As for us, we consider that personality rights are non-patrimonial prerogatives tightly related to humans, compulsory to his/her biological experience and achieving his/her personality, psychologically and socially, and that can be defended by appealing to justice<sup>9</sup>.

With regard to the legal nature of such rights, we mention that they are non-patrimonial personal rights and they are: unalienable, intransmissible, indistinguishable, cannot be performed by a representative, indefeasible, absolute, opposable to all, universal.

The classic French doctrine states the same, it frequently uses the designation of „extrapatrimonial rights” just to emphasize that they are not part of the patrimony assets of the person, as we all know it is made up of „the totality or universality of the patrimonial rights and obligations belonging to another person”<sup>10</sup>.

Still, there is no unitary agreement in the Romanian or in the foreign doctrine regarding the rights which are part of the category of personality rights. Usually, the criteria used to classify the non-patrimonial rights are also used to delimitate the personality rights.

We consider as relevant the following classification proposed in the doctrine<sup>11</sup> whose criterion is the triad of human structure – the man as bio-psycho-social being – and which divides the personality rights into the following categories: personality rights regarding the human being as a bio-psychical entity (right to life, right to physical and psychical integrity, right to dispose of his/her own body, right to his/her own voice); personality rights regarding the man as subject of emotional or affective moods (right to honour, right to reputation, to dignity, right to respecting affectionate feelings in case of death of a close person); rights regarding to the protection of man as a social being (into a subdivision, we speak about rights belonging to the natural person: right to name, right to domicile, right to civil status, right to respecting the private life, right to image, right to intellectual creation – the non-patrimonial side, and rights defining the legal person: right to denomination, right to headquarters, right to its own enterprise, emblem).

Also, starting from the provisions of the Romanian civil code in force dedicated to personality rights, which are divided in four sections: “Common

<sup>9</sup> A. Drăghici, R. Duminică, *op. cit.*, pp. 22–24; R. Duminică, A. Drăghici, *General considerations regarding right over own body with references to the New Civil Code*, în: „Scientific Session Proceedings. The International Conference CKS”, 2010, pp. 410–420.

<sup>10</sup> L. Pop, L. M. Harosa, *Drept civil. Drepturile reale principale*, Universul Juridic Publishing House, Bucharest 2006, p. 130.

<sup>11</sup> C. Jugastru, *Reflecții asupra noțiunii și evoluției drepturilor personalității*, în: *Anuarul Institutului de Istorie „George Barițiu”*, Cluj-Napoca, Series Humanistica, vol. 5, Publishing House of the Romanian Academy, Bucharest 2007, p. 329.

provisions”, “Rights to life, health and integrity of natural persons”, “Respect of private life and of dignity of human being” and “Respect due to the person also after his/her death”, the recent doctrine<sup>12</sup> classifies such rights according to the moment when they protect the values related to human being: during the life and after the death of the natural person.

Practically, it is impossible to make an inventory of all personality rights, the list remaining always open. Moreover, the French doctrinaires<sup>13</sup> appreciate that at present we face a real inflation of personality rights. Even if the Romanian lawmaker, by art. 58 of Civil Code, specifies the personality rights, this specification is given only as an example, not limited<sup>14</sup>, issue supported by the marginal denomination of the article *Personality rights*, but also by the end of the article which uses the phrase „and other such rights recognised by law”. Thus, art. 58 provides that „Any person has the right to life, to health, to physical and psychical integrity, to dignity, to his/her own image, to respecting the private life, and other such rights recognised by law”. To these rights, they add the attributes of identification of the natural person (art. 59 of Civil Code) and the right to dispose of himself/herself (art. 60 Civil Code).

### *The legal means of protection of personality rights*

The current Romanian Civil Code regulates in detail the issue of protection of non-patrimonial<sup>15</sup>, dedicating a full title at the end of Book I, suggestively named *Defence of non-patrimonial rights*, which is the common law in the matter, and there can be additions and derogations from this regime by special provisions. Whereas the personality rights, as shown above, are non-patrimonial rights, such provisions are enforceable for them.

Art. 252 of Civil Code consecrates the principle of protection of human personality, showing that „any natural person has the right to protection of the values inherent to the human being, such as life, health, physical and psychical integrity, dignity, intimacy of private life, liberty of conscience; scientific, artistic, literary or technical creation”.

Any damage brought to such rights, as well as to any other non-patrimonial rights which are not included in the exemplified text made by the law-

<sup>12</sup> E. Chelaru, *op. cit.*, p. 21.

<sup>13</sup> See also: X. Pradel, *Le prejudice dans le droit civil de la responsabilite*, Librairie Generale de Droit et de Jurisprudence, Paris 2004, p. 123.

<sup>14</sup> For the same point of view, see: E. Chelaru in *Noul Cod civil, comentariu pe articole*, C.H. Beck, Bucharest 2012, p. 63.

<sup>15</sup> See also: O. Ungureanu, C. Munteanu, *Protecția drepturilor nepatrimoniale cu privire specială asupra drepturilor personalității în concepția noului Cod civil*, „Romanian Journal of Private Law” 2012, no.1, pp. 244–264.

maker, and therefore to any other personality rights, shall involve a material and a non-patrimonial prejudice. The fact that the non-patrimonial damages are difficult to be estimated materially, it does not mean that the law cannot allow the grant of monetary compensations for them.

Pursuant to the provisions of art. 253 of Civil Code, the natural person whose non-patrimonial rights were violated or threatened, can claim anytime to a court:

- a) to forbid the accomplishment of the illegal deed, if it is imminent;

Such a claim shall be admitted by the court of law only if the illegal deed has not yet been committed, but its occurrence is imminent. Moreover, the recent doctrine showed that „a simple eventuality of a harm is not enough, it must be a threat that is serious, and the behaviour of the virtual aggressor has to bear concretely in it the harm of a value of personality”<sup>16</sup>. It is not necessary that the plaintiff makes the proof that the author of the threat is guilty.

- b) to cease the violation and to forbid it in the future, if it still lasts;

The plaintiff can make such an action only if the violation of the right covers a certain period of time and it has not ceased yet. The duty of proving the harm made to one of his/her rights comes to the plaintiff. But he is not bound to prove the guilt of the author of the violation.

- c) to establish the illegal character of the deed committed, if the trouble produced still exists.

Such an action can only be exerted when the harm ceased, but there still is a trouble. The purpose of such action is in removing such trouble. The notion of trouble has here the meaning of harm, violation of a non-patrimonial personal right.

We are here in the presence of a special form of declaratory action of the right, more precisely it is considered<sup>17</sup> as a declaratory action because by it they tend to remove a state of uncertainty still existing over the legitimacy of the behaviour of the author of the harm.

Also, pursuant to art. 253 para.3 of Civil Code, the person who suffered a violation of a non-patrimonial right can claim to court to make the author of the deed accomplish any measures considered as necessary by the court in order to reach the recovery of the right damaged, such as: make the author, at his/her expense, publish the decision of conviction, any other measures necessary to cease the illegal deed or to recover the damage caused.

Besides these three types of defence actions, the damaged person can claim, pursuant to art. 253 para.4 of Civil Code, damages or, if any, a patrimonial

<sup>16</sup> *Eidem, Drept Civil. Persoanele, op. cit.*, p. 90.

<sup>17</sup> *Ibidem*, p. 92.

compensation for the patrimonial or non-patrimonial damage caused, if the damage is attributable to the author of the damage. With regard to the term of compensation used by the lawmaker, it was shown<sup>18</sup> that its use is not appropriate here because they do not intend to replace an economic value lost with another one, but they intend to attenuate some physical or psychical sufferance, with a compensatory nature, the appropriate term is that of monetary compensations.

Even if the non-patrimonial personal rights are indefeasible, the right to the action to compensate the moral and material damages occurred due to their violation, is subjected to extinctive prescription<sup>19</sup>.

The lawmaker dedicates a special article to the defence of the main attribute of identification of the natural person, the right to name. Thus, pursuant to art. 254 of Civil Code, the person whose name is contested, can request the court of law to recognize his/her right to that name. Also, the person who is injured by the total or partial usurpation of his name, can anytime request to the court of law to decide the cessation of this illegal harm.

Until the filing of an action to defend the non-patrimonial rights injured or threatened by an actual or imminent illegal harm that could cause an almost irreparable damage, the injured party can ask the court to take some temporary measures<sup>20</sup>.

The court can decide mainly:

- a) to forbid the violation or its temporary cessation;
- b) to take the necessary measures to preserve the evidence.

The request to establish the temporary measures is solved pursuant to the provisions of arts. 982–987 of Civil Procedure Code in force on presidential judge's order.

In case the temporary measure was requested before making an action on the merits, the term within which the main action should be filed shall be established by the same presidential judge's order.

In case the main request is not filed in due term or within at most 30 days from taking the temporary measures, they shall cease de jure. The court can make the plaintiff offer a bail, under the sanction of a de jure cessation of the measure decided, in case they establish that the temporary measures decided could cause damage to the other party, and the bail can be reimbursed. If the action on the merits is rejected as groundless, the plaintiff is bound, at

<sup>18</sup> L. Pop, *Reglementările noului Cod civil cu privire la repararea prejudiciului în cazul răspunderii delictuale*, „Law Magazine” 2010, no. 6, pp. 11–37.

<sup>19</sup> For the same point of view, see: M. Nicolae, *Tratat de prescripție extinctivă*, Universul Juridic Publishing House, Bucharest 2010, pp. 1163–1164.

<sup>20</sup> O. Ungureanu, C. Munteanu, *Drept Civil. Persoanele*, op. cit., p. 99.

the request of the interested party, to compensate the damage caused by the temporary measures taken. This obligation does not last if the plaintiff was not proven guilty or if he/she had only a slight guilt; in such cases, the court can reject the request to make the plaintiff pay compensations or can decide to reduce them<sup>21</sup>.

And last but not least, we mention that, pursuant to art. 256 of Civil Code, following the death of the injured person, the action to recover the non-patrimonial right violated can be continued or initiated by the surviving spouse, by any of the direct relatives of the deceased person, and by any of his/her extended family members until the fourth degree<sup>22</sup>.

In conclusion, by the detailed regulation of such means of defence, the Romanian lawmaker reinstated the importance of such rights. Among the rights a person can have, the personality rights are the most important ones because they are compulsory for his/her biological existence and for the accomplishment of his/her personality.

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<sup>21</sup> A. Rădoi, in *Noul Cod civil, comentariu pe articole*, C.H. Beck Publishing House, Bucharest, 2012, pp. 250–251.

<sup>22</sup> See also: A. Drăghici, R. Duminiță, *op. cit.*, pp. 22–24.

Ungureanu O., Munteanu C., *Drept civil. Persoanele*, Hamangiu Publishing House, Bucharest 2013.

Ungureanu O., Munteanu C., *Protecția drepturilor nepatrimoniale cu privire specială asupra drepturilor personalității în concepția noului Cod civil*, „Romanian Journal of Private Law” 2012, no.1.

### **Abstract**

#### **The Legal Protection of the Personality Right in the Romanian Civil Legislation**

Personality rights are part of the category of non-patrimonial subjective rights, as they protect values without a monetary expression, such as life, dignity, honour, image, private life and so on. At present, in Romania the personality rights enjoy an express regulation in the Civil Code, starting with the provisions of art. 58 providing the right to life, to health, to physical and psychical integrity, to dignity, to his/her own image, to respecting the private life, and other such rights recognised by law. The specification made by the Romanian lawmaker is given as an example, so other rights also have the vocation to be characterised as personality rights. Because they belong to the category of non-patrimonial personal rights, personality rights shall have the legal features specific to this category, being inaccessible, intransmissible, indistinguishable, not performed by a representative, indefeasible, opposable to all. Starting from such considerations, this work deals with the issue of legal means of defence of such rights from the perspective of the Romanian Civil Code which dedicates them a whole title named "Defence of non-patrimonial rights", representing the common law in the matter, additions or derogations being able to exist from this regime by special provisions.

**Key words:** personality rights, non-patrimonial rights, defence means, Romanian Civil Code